THE BAR of NORTHERN IRELAND

Independent Human Rights Act Review

Call for Evidence

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland which comprises 650 self-employed members who operate on an independent referral basis. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy, serving the administration of justice and upholding the rule of law across this jurisdiction. Northern Ireland's independent referral Bar represents one of the cornerstones of our legal and justice system with an important history of providing expert impartial representation across a range of areas, including human rights law.

2. The Bar Council notes that the Independent Human Rights Act Review (IHRAR) was launched in December 2020 and the engagement to date from the Review Chair, Sir Peter Gross, has been welcome. The Chair of the Bar Council of Northern Ireland Bernard Brady QC met with Sir Peter shortly before the launch of the Review's Call for Evidence in January 2021 to discuss the approach being taken to it. However, we remain disappointed that the Call for Evidence gives a timeframe of just seven weeks for responses from stakeholders. We consider that this is inadequate to allow for suitably researched and nuanced contributions on a subject matter of such importance for citizens across all four jurisdictions of the United Kingdom. The Review Chair's commitment to "*engagement with interested parties*" once written submissions have been considered, including a planned roundtable with stakeholders in Northern Ireland, may go some way to ensure a deeper examination of the issues raised within the tight timeframe allotted to the Review.

3. We preface our response by highlighting that the background to the Review merits some acknowledgement. The Conservative Party manifesto from 2019 stated an intention to "*update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government*".[1] There is an apparent assumption of a need to update the

[1] Conservative Party Manifesto 2019 at https://assets-global.website-

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HRA because the "*balance*" in question is not already proper and we see no evidence to support this proposition. We do not believe that the scepticism around the HRA which exists in some parts of the political arena accurately reflects evidence of any structural issues within the Act itself which could be used to justify any widespread amendments to it. It is difficult for us to divorce the Review from this political context despite the apparent commitment to operating in a transparent fashion and examining the issues with "*no pre-conceived answers*". Therefore we have concerns that the Review will attempt to make recommendations aimed at altering the UK's existing constitutional balance by seeking to curtail the power of the courts and, correspondingly, increase the power of the executive.

4. We recognise that the introduction to the IHRAR is couched in broadly positive terms and outlines that "*the UK's contribution to human rights law is immense. It is founded in the common law tradition, was instrumental in the drafting and promotion of the European Convention on Human Rights (the Convention) and is now enshrined in the Human Rights Act 1998 (HRA)".* However, we do not agree with the assertion that after 20 years of the HRA now "*is timely to review its operation and framework*". There have been previous attempts at this in various guises over the last two decades, including through a Bill of Rights for the UK.[2]

5. We note that the terms of reference have been "*drafted in neutral terms*", emphasising that the Review has "*no pre-conceived answers*". However, the two specific themes the review considers are framed by negative connotations of the HRA to some degree by asking whether the courts have been "*unduly drawn into areas of policy*" and whether there is a "*case for change*" in a range of areas. The review appears to be limited to the operation of sections 2, 3 and 4 of the HRA, rather than the content of the Convention rights, yet it is unfortunate that nowhere does the Review's Terms of Reference balance this with specific questions aimed at allowing individuals and organisations to contribute ways in which the HRA has had a positive impact in successfully protecting people's human rights.

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6. Therefore we are concerned that the terms in which this limited review are expressed appear to float proposals to the effect that (i) in relation to section 2, there is a need to reduce the degree to which domestic courts take into account decisions of the European Court of Human Rights (ECtHR) and the Committee of Ministers and (ii) in relation to sections 3 and 4, the courts have been guilty of "judicial overreach" and therefore need to be reined in. The Bar does not consider that the HRA is outdated or that the operation of sections 2, 3 or 4 gives rise to any legitimate concern.

7. However, we are alarmed by the prospect that the Review could potentially lead to a divergence between the jurisprudence of the UK courts and that of the ECtHR and a diminution of the powers of the courts to give effect to the Convention rights.

Furthermore, the prospect of a divergence between domestic courts and the ECtHR is particularly worrying in Northern Ireland. Such a divergence would threaten the basis of the constitutional settlement here, insofar as the divergence could dilute the protections guaranteed by the Convention.

[2] Joint Committee on Human Rights, '*A Bill of Rights for the UK?*' (Twenty-ninth Report of Session, 2007-08) at https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf and House of Lords European Union Committee, '*The UK, the EU and a British Bill of Rights*' (Twelfth Report of Session, 2015-16) at https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf

8. There are also inevitably comparisons between this Review and the Independent Review of Administrative Law (IRAL) which concluded a Call for Evidence in October 2020 and has yet to report.[2] This contained a questionnaire directed primarily at public bodies and was deliberately skewed to elicit negative attitudes towards judicial review by pushing respondents towards considering whether the prospect of judicial review "*seriously impedes the proper or effective discharge of central or local governmental functions*" and results in "*compromises which reduce the effectiveness of decisions*".

[2] See the Bar's response to the Independent Review of Administrative Law, October 2020 at https://www.barofni.com/news/independent-review-of-administrative-law

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9. The Bar is currently unclear as to whether there is any interaction between the IRAL and the IHRAR given that both panels are running largely simultaneously. The report from the IRAL could have been a point of reference for the IHRAR given the overlap between judicial review and the HRA yet it currently appears that the IHRAR cannot reflect on any substantive proposals produced by the IRAL and potentially consider recommendations related to these. The HRA and judicial review are closely interlinked and it is concerning that the two panels, and ultimately executive and parliamentary thinking on them, seem to be operating in silos when they should be more closely aligned.

10. The Bar's submission to the IHRAR's Call for Evidence is principally aimed at addressing the premise of the Review's Terms of Reference insofar as they relate to Northern Ireland and to explain why possible reforms in this area could have consequences for the courts in this jurisdiction which would be detrimental to the public interest here given our unique circumstances as a society with a history of conflict and division. It reflects the views of our practitioners with many years of dedicated experience specialising in human rights law. Our response is structured to begin with an overview specifically placing the Review's Terms of Reference within context for Northern Ireland before dealing with the two themes and questions detailed in the Call for Evidence document.

Overview: Human Rights in Northern Ireland

11. The Belfast Agreement 1998 saw the UK Government undertake the "*complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the court and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on the grounds of inconsistency*".[3] The new constitutional arrangements outlined therein are enshrined in

[3] The Belfast Agreement, Strand 3 on "Rights, Safeguards, and Equality of Opportunity" paragraph 2, 10 April 1998 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

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the Northern Ireland Act 1998 (NIA) which is "*in effect a constitution*"[4] and should therefore be accorded the status and importance of a constitution. It is also worth noting that a vital element of the human rights and equality guarantees contained in the Agreement has been the effective delivery of ECHR rights in domestic law; the HRA played an important part in being the mechanism that delivered on this. The HRA therefore has a distinctive constitutional function in Northern Ireland unlike other parts of the UK and any efforts to alter this under the terms of this Review risks unsettling a delicate balance.

12. Furthermore, a complex relationship exists between the HRA and the NIA as the ECHR is independently incorporated into the devolution settlement in NI through the NIA. In considering the NIA in more depth, an Act of the Northern Ireland Assembly is invalid if it is incompatible with any of the Convention rights by virtue of Section 6. Section 24 provides that a Minister or Department in Northern Ireland has no power to make, confirm or approve of any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with any of the Convention rights.

13. Section 98(1) of the NIA provides that "the Convention rights" has the same meaning as in the HRA, which is that "the Convention rights" means the rights and freedoms set out in Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First Protocol; and Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention (section 1(1) of the HRA). It is debateable whether section 2 of the HRA applies to courts deciding a question that arises under the NIA which postdates the HRA and could not therefore have been in contemplation when the HRA was passed. However, the requirement in section 2 of the HRA that courts "*must take into account*" ECtHR jurisprudence in determining questions concerning Convention rights was certainly in mind when the NIA was passed. The expectation behind sections 6 and 24 of the NIA was that these important constitutional provisions, limiting the powers of both the executive and legislature exercising devolved powers in NI, would be construed in harmony with Strasbourg jurisprudence.

[4] *Robinson v Secretary of State for Northern Ireland and Others* [2002] UKHL 32, Lord Bingham at [11]

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14. Consequently, the Ministry of Justice in commissioning this review may inadvertently be setting in train a course of action that could have the unintended consequence of undermining this foundation of the NI constitution. Although the Review's Terms of Reference aim to preclude proposals that would impact the substantive rights contained within the Convention, it is difficult to see how a divergence between the jurisprudence of the UK courts and that of the ECtHR would have any result other than a divergence between the substantive rights as recognised and protected by UK courts on the one hand and by the ECtHR on the other. We presume that this would indeed be the point of allowing or encouraging UK courts to loosen their ties with the ECtHR.

15. However, it is the Bar's view that this Review should not suggest legislative change which would disrupt the delicate balance of the NI constitution. That would ultimately be the effect if the divergence resulting from a more relaxed relationship with ECtHR jurisprudence led to an effective diminution of the rights that were intended to be guaranteed by the NIA, including the powers of the court to intervene in the event of infringement. Divergence does not, of necessity, have to lead to a reduction of rights, yet we believe that is unmistakeably the direction of travel that the Government intends by commissioning this Review. In any event, it is undesirable to create a state of affairs in which, at best, there would be uncertainty as to whether the Convention rights as understood by ECtHR are the same as the Convention rights protected by the NIA and, at worst, there would actually be material differences between the two, albeit that they are nominally the same.

16. Moreover, since it is not apparently intended to remove the right of individual petition to Strasbourg, the predictable outcome of decisions by UK courts to adopt interpretations of Convention rights that are inconsistent with ECtHR decisions would be applications to the ECtHR that would then give effect to the Strasbourg jurisprudence. Instead of "bringing rights home" and largely eliminating the need for time-consuming and costly complaints to Strasbourg, which was the rationale for the HRA in the first place, applications to UK courts would become merely the first port of call in a process of protracted litigation extending ultimately to Strasbourg and involving the UK Government as a necessary party in every case at that stage. The same would apply if, by amending sections 3 and 4 of the HRA, the domestic courts were prevented from examining human rights complaints in the first place.

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17. The Review Panel has noted that the HRA is a protected (entrenched) enactment under the devolution settlements and therefore it cannot be modified by the NI Assembly as per section 7 of the NIA. However, we would query whether it can be properly be modified by Parliament insofar as it affects NI. By virtue of the sovereignty of Parliament, it surely can be as a matter of strict constitutional law but whether it can be in a manner that is consistent with the devolution settlement is another matter. The Review Panel will appreciate that justice, including human rights, is a devolved (transferred) matter in Northern Ireland. Parliament cannot legislate unilaterally about human rights without breaching the Sewel Convention; admittedly this is a political convention that is not legally enforceable yet any legislation traversing on devolved matters normally requires a Legislative Consent Motion in the Northern Ireland Assembly.

18. The HRA deals with human rights yet, paradoxically, that may not mean that the Sewel Convention would operate to inhibit Parliament from amending it in the absence of a Legislative Consent Motion from the Assembly. On one view, the fact that the Assembly cannot modify the HRA means that Parliament would not be exercising a power that is exercisable by the Assembly. Consequently, Parliament could properly repeal the entire HRA without triggering the Sewel Convention, even though the effect would be to abolish all domestically enforceable human rights other than those that might have been previously available under the common law, not to mention the removal of the human rights guarantees and safeguards underpinning the constitutional foundations put in place by the NIA.

19. As already referenced at paragraph 13, the NIA refers to compatibility with Convention rights which are defined as those referred to in the HRA. The Terms of Reference do not foresee any change being made to the substantive rights protected by the HRA, only instead to its "*operation and framework*". However, we would go further in suggesting that this distinction will prove difficult to sustain in reality. Ultimately any significant future changes to the HRA proposed by this Review would potentially create a gap between an amended HRA and how the ECHR has been delivered through the NIA in Northern Ireland. It is unclear whether this gap might even be addressed by an attempt to amend the NIA yet we consider that this would only serve to exacerbate the destabilising impact of any reforms to the HRA; our

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constitutional settlement could become nothing more than a casualty of a review which has not adequately considered human rights practice and procedure in this jurisdiction.

20. Some of these issues have already been the subject of extensive academic debate, particularly in connection with earlier proposals to repeal the HRA in its entirety. We do not propose to rehearse here the arguments that will no doubt be addressed in detail by others. Suffice to say that, quite apart from the threat to the political settlement in NI, the Bar has a real concern about the constitutional propriety of any significant amendment made to the HRA without the consent of the NI Assembly. It is also unclear as to whether there would even be political support for any such move intent on potentially limiting human rights protections in Northern Ireland.

21. Furthermore, the Review Panel must take into account the environment in which the courts operate in Northern Ireland. Our devolution settlement is inextricably linked to the divisive issues which precipitated its inception and still characterise its operation in the present day.[5] In respect of transferred powers, Northern Ireland's Government operates by way of mandatory coalition which brings its own unique governance challenges with political stability often reliant on the relationships between opposing political parties within a multi-party Executive. Northern Ireland spent over three years between January 2017 and January 2020 in the absence a functioning Executive and Assembly with the UK Government declining to assume powers to administer direct rule from Westminster during this period. This inevitably gave rise to serious issues concerning the powers of civil servants to make decisions that would ordinarily have been made by Ministers or the Executive described by Stephens LJ in the Court of Appeal as a form of governance "*neither democratic nor appropriately accountable*".[6]

[5] Colin Knox, *Devolution and the Governance of Northern Ireland*, Manchester: Manchester University Press, 2010, page 8

[6] *JR80's Application* [2019] NICA 58 at [93]. This case involved an application brought by a survivor of Historic Institutional Abuse who successfully challenged the failure to implement a redress scheme as recommended by the final report of the Historical Institutional Abuse Inquiry delivered in January 2017.

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22. This situation often placed the spotlight on the courts between 2017 and 2020, particularly in cases involving human rights, which may have served to create a misconception of judicial overreach in policy matters in the absence of Government. However, in such difficult circumstances the courts are the only branch of state power that operates in the field of devolved matters.[7] Whilst that certainly does not justify any extension of their jurisdiction into the field of executive policy-making, it certainly militates against any restriction of their power to examine the compatibility of laws or executive decision-making with Convention rights, as interpreted by the body invested by the Convention with the responsibility to do so.

23. There is also a range of unique case law in NI in which the appropriate roles for the judiciary, executive and legislature have been discussed by the courts at length.[8] The courts are very conscious of the need to ensure that they do not enter the realm of complex policy matters involving decisions for politicians to take, including those cases involving Convention rights. It is very clear that even where incompatibilities between domestic matters and Convention obligations are raised or identified, any subsequent steps will be a decision for the executive and legislature to take. Funding for legacy inquests is just one example of this with the comments of Girvan LJ of note in *Hughes (Brigid) Application* [2018] NIQB 30 at [72]:

[7] See comments of McCloskey J in his leave decision (see [2018] NIQB 32 at [13]):"*One of the consequences of the [indefinite moratorium afflicting the Executive and legislature of Northern Ireland]… is that members of the Northern Ireland population are driven to seek redress from the High Court in an attempt to address aspects of the void brought about by the absence of a functioning Government and legislature… While the spotlight on the implementation of the HIA redress proposals should be firmly on the Northern Ireland Executive and Assembly it is, rather, on the courts".*

[8] See for example *The Department of Justice v Bell (Patricia) and Police Ombudsman for Northern Ireland* [2017] NICA 69 in which Gillen LJ espouses a number of important principles at [19] in distinguishing between decisions for the Executive and the courts: "*There should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary*".

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"*This court cannot direct Government departments how to spend public funds in view of the polycentric issues involved. The use of significant public funds in dealing with legacy inquests would have an impact on other aspects of the DOJ budget and the overall Northern Ireland budget. Important though compliance with Article 2 procedural requirements are, unlimited funds cannot be dedicated to legacy inquests. Funds dedicated to legacy inquests may result in less monies being available in other fields where other pressing human rights issues may arise. Finding the right balance is for the relevant authorities not for the court. Strasbourg authorities recognise that proportionality considerations have a role to play in what is demanded of state authorities in complying with Convention obligations*".

24. Finally, the Bar is very concerned that this Review calls into question the Government's commitment to human rights and its intention to retain the ECHR at the centre of the UK's constitution. We note that the Review is interested in views from across "*all four nations*" of the UK and the composition of the Panel includes Baroness Nuala O'Loan which will undoubtedly be helpful in providing a perspective from this jurisdiction. We urge the Panel to be mindful that the Review must fully consider the potential significant risks which any changes to the HRA will entail for the stability of the complex constitutional settlement in Northern Ireland. As outlined above, we do not believe that changes in the operation of the HRA in this jurisdiction are necessary, or indeed, desirable in any way. The remainder of our response is structured in accordance with the questionnaire contained in the Call for Evidence.

Theme One – Relationship between the Domestic Courts and the ECtHR

a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

25. No – the Bar does not see a need for any amendment of Section 2. Section 2(1) (a) of the HRA provides that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the ECtHR, in so far as, in the opinion of the court, it is relevant to the proceedings. We believe that this provision has been applied

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appropriately to date by the courts in Northern Ireland. Our judiciary has taken ECtHR jurisprudence into consideration on numerous occasions when ruling on the application of the HRA to cases under consideration. They have always adhered to the established doctrine of following the binding domestic precedent and leaving it to the Supreme Court to decide on the ECtHR's ruling in situations involving a possible conflict with a ECtHR decision.

26. The Supreme Court's approach is clear in this respect too. This is evidenced in *Manchester City Council v Pinnock* [2011] UKSC 6 where Lord Neuberger stated at [48] that national courts may be expected to follow Strasbourg jurisprudence where there is a "*clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of [UK] law*" as long as the "*reasoning does not appear to overlook or misunderstand some argument or point of principle*". There are also examples of domestic cases where the courts have moved beyond Strasbourg jurisprudence in cases involving Article 8. For example, the House of Lords in the NI case of *Re G (A Child) (Adoption: Unmarried couples)* [2008] UKHL 38 held that a ban on unmarried couples and those in same-sex relationships adopting children under The Adoption (Northern Ireland) Order 1987, even where it would be in the best interests of the child for them to be allowed to do so, was incompatible with Article 8 and Article 14 rights.

27. It is also clear that there is scope for domestic courts to in fact go beyond the jurisprudence of the ECtHR in its interpretation where Strasbourg has not disclosed a clear view. The panel may be interested to consider the opinion of Lord Kerr in *Ambrose v Harris (Procurator Fiscal, Oban) (Scotland); Her Majesty's Advocate v G (Scotland); Her Majesty's Advocate v M (Scotland)* [2011] UKSC 43 on the relationship between the domestic courts: "*It is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg. As a matter of practical reality, it is inevitable that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from ECtHR… If the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those arguments*".

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28. Furthermore, it is also unclear as to how any revisions to section 2 HRA would substantially alter the domestic judiciary's approach to the Convention case law; the ECtHR operating within its current jurisdiction provides an invaluable range of jurisprudence which is now embedded in the UK and has only served to enrich and enliven human rights law. We are very concerned that the review may be designed to produce proposals in relation to section 2 which will aim to reduce the degree to which domestic courts take into account decisions of the ECtHR. Any attempt at removal of section 2 or to potentially permit recourse to a more extensive range of comparative law sources would instead open up the possibility of increased unpredictability in the UK's human rights law regime which would be highly undesirable.

29. In the specific context of Northern Ireland, we are alarmed by the prospect that changes to section 2 could lead to a divergence between the jurisprudence of the UK courts and that of the ECtHR and a diminution of the powers of the courts to give effect to the Convention rights. As explained above, the prospect of such a scenario would threaten the basis of the constitutional settlement here, insofar as the divergence could dilute the protections guaranteed by the Convention.

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

30. No - There is no need to change the approach taken to the "margin of appreciation" by domestic courts and tribunals. We do not see any issue in relation to how our courts have applied their discretion in this area in Northern Ireland. One example of the operation of this in the NI context relates to abortion law. *In the matter of an application by the NI Human Rights Commission for Judicial Review* [2018] UKSC 27 involved an application seeking a declaration of incompatibility that, pursuant to Section 4 of the HRA, sections 58 and 59 of the Offences Against the Person Act 1861 were incompatible with Article 3 and Article 8 ECHR. Article 8 is an area in which the UK has a certain "margin of appreciation" as to how it seeks to protect the right to a private and family life. A majority found that the law in Northern Ireland was

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incompatible with the right to respect for private and family life, guaranteed by Article 8 ECHR, insofar as it prohibits abortion in cases of rape, incest and fatal foetal abnormality. [9] Parliament subsequently decriminalised abortion in NI in 2019 alongside the introduction of the Abortion (Northern Ireland) Regulations 2020.

31. The Northern Ireland case of *Re Siobhan McLaughlin* [2018] UKSC 48 may also be of interest to the panel in this area as it shows the courts taking a pragmatic approach to the use of their discretion in relation to interpretation of Article 8. The case involved a challenge to the Department for Communities for refusing to pay widowed

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parent's allowance to a mother solely on the grounds that she had not been married to her partner before his death under section 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992. The Supreme Court reversed the Court of Appeal decision and held by a majority of 4 to 1 that section 39A was incompatible with Article 14 of the ECHR in conjunction with Article 8.

32. Questions around departing from ECtHR decisions have arisen on occasion in other areas in the UK context. For example, *Secretary of State for the Home Department v AF and others* [2009] UKHL 28 and *A and others v UK* (Application no. 3455/05) which involved control orders under the Prevention of Terrorism Act 2005. This saw the House of Lords compelled to follow the decision in *A v UK*, despite disagreeing with it, for several reasons; the Government had expressly asked the Grand Chamber to deal with the very issues that arose in the *AF* case and it gave an unambiguous ruling on the specific issue just days before the hearing in the House of Lords in *AF*.[10]

33. However, this case dealt with a set of very unique circumstances and the suggestion in some political circles that the ECtHR can dictate legal change in the UK on domestic matters is entirely misguided. The principle of subsidiarity, the "margin of appreciation" afforded by the ECtHR and the fact that decisions of the Strasbourg

[9] See also *Re Ewart's Application* [2019] NIQB 88 and *Re Ewart's Application (Relief)* [2020] NIQB

[10] Lord Kerr, *'The conversation between Strasbourg and national courts - dialogue or dictation?'* Irish Jurist 2009, 44, 1-12

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court require implementation by national authorities in order to be translated into domestic law already operate to moderate the influence of the ECtHR. The development of the requirements under section 2 HRA through judicial interpretation in the UK over the last 20 years and the ECtHR's doctrine of "margin of appreciation" cater sufficiently for any issues arising at the national level.

34. The UK courts can decline to follow the ECtHR, on the rare occasion that the Strasbourg Court has not sufficiently appreciated or accommodated particular aspects of the UK's domestic constitutional position. The decision of the UK Supreme Court in *R v Horncastle and others* [2009] UKSC 14 provides compelling authority for the suggestion that domestic courts will not simply apply relevant Strasbourg case law as a matter of course; critical engagement with the Strasbourg jurisprudence in domestic adjudication can even lead to a reconsideration and refinement of the ECtHR position.[11]

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

35. Yes – The Bar believes that the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permits domestic courts to raise concerns as to the application of ECtHR jurisprudence. Therefore we do not believe there is any need for it to be strengthened in any way. The *R v Horncastle and others* [2009] UKSC 14 and *Al-Khawaja v UK* (2009) 49 EHRR 1 series of cases exemplifies the development in recent years of a more meaningful dialogue between the ECtHR and the Supreme Court. This involved the Supreme Court's concerns around whether a decision of the Strasbourg Court sufficiently appreciated or accommodated particular aspects of the UK trial process involving hearsay evidence.

[11] See also *Animal Defenders International v United Kingdom* [2013] ECHR 362

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36. In such circumstances, it was open to the Supreme Court to decline to follow Strasbourg jurisprudence, giving reasons for doing so. The Strasbourg Court then had the opportunity to reconsider the particular aspect of the decision at issue thereby paving the way for a dialogue between the courts. This demonstrates that dialogue and engagement already takes place between the two courts in a cooperative fashion which permits domestic courts to raise any concerns as to the application of ECtHR jurisprudence on the very rare occasion that this is necessary.

Theme Two – Impact of the HRA on the relationship between the judiciary, executive and the legislature

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)? ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

37. No – The Bar does not believe that legislation is being interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights under section 3. We are unaware of any instances where this has occurred in relation to decisions taken by courts in Northern Ireland. Section 3 is central to the operation of the HRA and it does not give the courts the power to interfere in policy making which is what this theme appears to be implying through reference to risks of "*over-judicialising public administration*"; it is

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already clear that the courts can only interpret legislation in a way which is consistent with the Act being interpreted. Parliament always remains sovereign in this process and the only option open to the courts is the declaration of incompatibility under Section 4. Section 4(6) specifically states that a declaration of incompatibility does not affect the validity, operation or enforcement of the law and the law remains in force until Parliament approves any change, if indeed it decides to do so.

38. Sections 3 and 4 are very closely interlinked and we believe amending or repealing Section 3 would serve no useful purpose. Furthermore, any attempt to remove or amend these sections to prevent domestic courts from examining human rights complaints would not remove the right of individual petition to the ECtHR therefore resulting in the need for time-consuming and costly complaints to Strasbourg as applications to UK courts would become merely the first port of call in a process of protracted litigation involving the UK Government as a necessary party in every case.

iii.	Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

39. The Bar does not believe that there is any need for reform in relation to declarations of incompatibility. There is nothing undemocratic in judges deciding whether Convention rights have been respected or declaring legislation to be incompatible given that the actual operation of the legislation is unaffected and it is for the legislature to change the law; this clearly does not usurp the role of Parliament.

40. It is worth noting that in Northern Ireland a range of remedies are already open to the courts in judicial review cases involving human rights which are discretionary and can be tailored to suit the particular needs of the case. The Judicature (Northern Ireland) Act 1978 (see also Order 53 of The Rules of the Court of Judicature (NI) 1980) makes provision for a range of flexible, practical and effective remedies which the court can direct, namely an order of mandamus, an order of certiorari, an order of prohibition, a declaration, an injunction and/or damages. The court also has the power to make

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the following: an award of damages (Order 53, rule 7), an order remitting the decision to the lower deciding authority for reconsideration or reversing or varying the decision (Section 21 of the Judicature (NI) Act 1978), an injunction or declaration concerning public office (Section 24 of the Judicature (NI) Act 1978) and, finally, a declaration under the Human Rights Act 1998.

41. Declarations of incompatibility are very rarely used in the Northern Ireland context; the most recent one we would refer the panel to is the decision by Treacy J in a case involving a widowed parent's entitlement to a social security benefit in the context of Articles 8 and 14. This decision was subsequently overturned by the Court of Appeal before being reinstated by the Supreme Court.[12] In addition, the court considered making a declaration in the context of judicial review proceedings on abortion law in Northern Ireland[13] in 2019 but adjourned the question of relief given the provisions of the Northern Ireland (Executive Formation etc) Act 2019 which required further consideration. No formal relief was subsequently considered necessary by the court given that the legislative change resulted in the matter being "*now firmly within the political arena*". This also clearly demonstrates the way in which the judiciary respects the boundaries between the courts and the roles of the executive and the legislature.

42. The panel should note that the Judicial Review Practice Direction in Northern Ireland[14] contains Appendix VII which specifically details the process which the parties must follow in cases involving the Human Rights Act 1998. Therefore Appendix VII highlights at paragraph 3 that a party who intends to rely on a Convention right or rights shall state that and specify "*in the case of an applicant, in the Order 53 Statement, in any other case, in a notice filed in the Central Office and served on the other parties, (a) details of the Convention right(s) which it is alleged have been (or would be) infringed and details of the alleged infringement; (b) the relief sought; (c) whether the relief sought includes - (i) a declaration of incompatibility; or (ii) damages in respect of a*

[12] *In the matter of an application by Siobhan McLaughlin for Judicial Review* [2018] UKSC 48; the Court of Appeal decision at [2016] NICA 53; the High Court decision from Treacy J at [2016] NIQB 11

[13] *Re Ewart's Application* [2019] NIQB 88 and *Re Ewart's Application (Relief)* [2020] NIQB 33

[14] Judicial Review Practice Direction 03/2018, Appendix VII at https://www.judiciaryni.uk/sites/judiciary/files/decisions/Practice%20Direction%2003-18%20%20Judicial%20Review.pdf

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judicial act to which section 9(3) of the Act applies; d) where the relief sought includes a declaration of incompatibility, details of the legislative provision(s) alleged to be incompatible and the grounds on which it is (or they are) alleged to be incompatible".

43. Furthermore, Appendix VII paragraph 4 goes on to highlight that "*An Order 121(2) Notice will be issued by the Court to the Crown and the parties if the Court is considering making a declaration of incompatibility of primary legislation. The Court will join as a party, if the requisite notice is given, a Minister, a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland Department*". At paragraph 5 "*An Order 121(3A) Notice will be issued by the Court to the Crown and the parties where the Court is considering the compatibility of subordinate legislation with a Convention right. The Court may join the Crown as a party*". These provisions make it clear that the court will take the views of the relevant Government Minister or Department into consideration and provide them with an opportunity to play an active role in any case potentially involving a declaration of incompatibility.

44. Finally, paragraph 6 states "*For the Court to identify any incompatibility issue that may arise and to comply with the notice requirement in the Rules, any party raising such an issue should specify clearly the necessary particulars in the Order 53 Statement, in the case of applicants, or in the notice, in the case of any other party*". The Judicial Review Practice Direction highlights that a properly formulated claim should always make clear the remedy being pursued and that the court will ensure that this remains under careful review as the proceedings advance. We consider that this process operates effectively in cases involving the Human Rights Act 1998 and there is no need for any change to declarations of incompatibility under Section 4.

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

45. Article 15 of the Convention allows the state parties to the Convention the possibility of derogating, in a limited and temporary manner, from their obligation to secure certain Convention rights and freedoms. At a domestic level Section 14 of the HRA allows the Secretary of State to make an Order stating that the UK will derogate from an Article of the ECHR, or any protocol to the ECHR, for the purpose stated in the

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order in certain emergency situations. Section 16 of the Act further provides that any such domestic derogation can only last a maximum of five years and then is automatically repealed unless extended again by a fresh order and further requires repeal if the derogation from the ECHR itself has been withdrawn.

46. The panel should consider *A and others v Secretary of State for the Home Department* [2004] UKHL 56 which saw the court issue a declaration of incompatibility in relation to a detention scheme under the Anti-Terrorism, Crime and Security Act 2001 which discriminated unjustifiably against foreign nationals and it quashed the derogation order made under Section 14 HRA. However, this was only possible because the Act expressly allowed for the orders to be challenged; the relevant section of the Act was later repealed in 2005.

47. We also note that future legislation allowing for derogations may not allow for legal challenges. For example, the Overseas Operations (Service Personnel and Veterans)

    Bill currently progressing at Westminster which appears to require derogation from the ECHR in advance of "*significant*" overseas operations at clause 12 and inserts a new section 14A to that effect into the HRA. However, the Bill currently makes no clear provision for the derogations to be open to challenge in domestic courts or for quashing orders where necessary. It still remains unclear that derogation for overseas operations will succeed and whether, at its most basic, peacekeeping efforts would even meet the threshold as "*a public emergency threatening the life of the nation*" as per article 15 of the Convention.

48. We believe that domestic courts must have the power to quash designated derogation orders which do not meet the criteria set out in Article 15 ECHR. The Bar takes the view that if derogations are to be made in the future then it is important that adequate opportunity is provided for legal challenge in relation to these which, if successful, could lead to the quashing of the orders.

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c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

49. No - The Bar does not believe that there is any case for change in this area. We are not aware of any issues arising in Northern Ireland around how our courts have dealt with subordinate legislation which is incompatible with Convention rights; Acts of the NI Assembly are regarded as subordinate legislation for the purposes of the HRA. Section 6 NIA also states that an Act of the NI Assembly is invalid if it is incompatible with any of the Convention rights. Section 24 provides that a Minister or Department in Northern Ireland has no power to make, confirm or approve of any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with any of the Convention rights.

50. There are cases in the NI context which may be of interest to the panel in relation to this issue. For example, in *Northern Ireland Commissioner for Children and Young People's Application for Judicial Review* [2009] NICA 10 Girvan LJ stated at paragraph [17] that "*where subordinate legislation enacted under the Northern Ireland Act infringes Convention rights, the simple consequence is that the courts must disregard the subordinate legislation if to enforce it would infringe a Convention right*". The issue was also revisited recently by the Court of Appeal in *Michael O'Donnell v Department for Communities* [2020] NICA 36. We would also add that that Bar would not be supportive of any change to the HRA to prevent the courts from issuing quashing orders. This would only result in an undesirable distinction between the remedies available to the court depending on whether secondary legislation is found to be unlawful on human rights grounds or on other grounds.

51. The recent Supreme Court case of *RR (Appellant) v Secretary of State for Work and Pensions* [2019] UKSC 52 also saw Lady Hale state at [27]: "*There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA.*

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Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear".

52. Furthermore, the panel should be aware that the Lord Chief Justice of Northern Ireland commissioned a comprehensive review of civil justice in Northern Ireland in 2015 with a report published in 2017. It addressed a range of matters, including a dedicated chapter on judicial review.[15] The recommendations made have now largely been addressed by the Practice Direction 03/2018. However, it is worth noting that no significant issues were raised in the context of this review in relation to the operation of judicial review, including the framework for cases involving either primary legislation or subordinate legislation in the context of compatibility with the HRA and Convention rights.

d)	In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

53. No - Existing case law has developed to emphasise that the Convention and the HRA generally apply to acts of public authorities taking place outside the territory of the UK in varied forms.[16] The Bar does not believe there is any case for change in this area and there is no need for the HRA to be amended to allow the UK to derogate from the ECHR in situations involving the military operating abroad. See also our response to part (b) above.

e)	Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

[15] Review of Civil and Family Justice in Northern Ireland, *Review Group's Report on Civil Justice*, September 2017, page 289 at https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/mediafiles/Civil%20Justice%20Report%20September%202017.pdf

[16] Examples include *Al-Skeini and others (Respondents) v Secretary of State for Defence* [2007] UKHL 26, *Al-Skeini v UK* (Application no. 55721/07), *Smith and others v The Ministry of Defence* [2013] UKSC 41, *Mohammed v Ministry of Defence* [2017] UKSC 1

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54. No - The Remedial Order process as set out in section 10 and Schedule 2 already strikes an appropriate balance between the need to remedy the incompatibilities quickly without further delay and the need to allow parliamentary scrutiny of the measures proposed.

Conclusion

55. The Bar takes the view that any changes to the HRA could significantly undermine Northern Ireland's unique constitutional settlement. We would not support any amendments to the HRA as part of this Review which would diminish the level of protection afforded to citizens in this part of the UK. Indeed any move in this direction would not be in step with the debate on human rights in NI more generally where the 'New Decade, New Approach'[17] agreement of 2020, which led to the restoration of devolved Government in NI, resulted in the establishment of an Assembly Committee with cross-community representation to explore a Bill of Rights for Northern Ireland which would seek to build on the HRA.[18]

56. Furthermore, the political narrative at times in the UK in recent years surrounding the case of *Cherry/Miller (No 2)* [2019] UKSC 41, alongside the subsequent IRAL and IHRAR, which all relate to the boundaries between the three branches of state have also served to further misconceptions around the supremacy of the court over the executive and legislature. The Bar considers that this Review arises out of a political context whereby a series of actions have been undertaken by the Government aimed at curtailing the power of the courts and ultimately diluting human rights protections for citizens in the UK. Unfortunately we believe that any changes to the "*operation*

[17] *New Decade, New Approach*, January 2020 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf

[18] View the Bar's evidence to the Ad Hoc Committee on a Bill of Rights, December 2020 at http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committeeon-a-bill-of-rights/written-briefings/the-bar-of-northern-ireland/

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and framework" of the HRA will only have damaging consequences for Northern Ireland which we have discussed at length throughout our submission.

57. Finally, we trust that our views will be of assistance to the Review Panel. We would welcome the opportunity to discuss any aspect of our submission with the panel in further detail.

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